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7  
8 Attorneys for Defendant:  
WEN YUEH LU

9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE DISTRICT OF GUAM

11 UNITED STATES OF AMERICA,

12  
13 Plaintiff,

14 vs.

15 WEN YUEH LU,

16 Defendant.  
17

MAGISTRATE CASE NO. 06-00031

**MOTION WAIVING DEFENDANT'S  
PRESENCE AND ACCEPTANCE OF  
WAIVER - F.R.CRIM.PRO. 43 (b)(2)**

18 Comes Now Defendant Wen Yueh Lu, through counsel undersigned, and brings  
19 this Motion pursuant to F.R.Crim.Pro. 43(b)(2) waiving Defendant's presence at criminal  
20 proceedings in the above noted magistrate case. Defendant requests that he be released, and freed  
21 of any conditions of release, except that of his posted bond, to permit his travel overseas based  
22 on employment as a captain of a fishing vessel.  
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**FILED**  
DISTRICT COURT OF GUAM

JAN 16 2007

MARY L.M. MORAN  
CLERK OF COURT

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6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **BACKGROUND**

8 Defendant WEN YUEH LU is a Taiwanese fifty-eight (58) year old man.  
9 Defendant was born in Taiwan (Republic of China). He has been married since 1968,  
10 and the couple have two children. Mr. Lu has a sterling career of 32 years on the ocean  
11 as a ship's captain or fishmaster. No criminal record of arrest or conviction exists in the  
12 world.

13 Defendant Lu has been offered firm employment to go to sea and captain  
14 on a new vessel. His immediate release is necessary and requested so that he may  
15 pursue his employment on the high seas with immediate return and travel back to his  
16 point of origin Taipei, Republic of China. Wherefore, Defendant Lu respectfully  
17 requests that the court grant his motion waiving his presence at criminal proceedings  
18 based on his consent to be tried *in absentia* and sentenced *in absentia*.

19  
20 **AUTHORITY**

21 Defendant Lu waives his right to appear and be present for his trial, and  
22 sentencing if applicable, for the purposes of this above Magistrate Case No. 06-00031.

23 F.R.Crim.Pro. 43 Defendant's Presence; (b) When Not Required; (2)  
24 Misdemeanor Offense states as follows:

25 b. A defendant may not be present under any of the  
26 following circumstances:

27 2. The offense is punishable by fine or imprisonment,  
28 for not more than one year, or both, and with the

4  
5  
6 Defendant's written consent, the court permits arraignment,  
7 plea, trial and sentencing to occur in the defendant's  
8 absence.

9 Defendant Lu has executed, after having been informed and advised, and  
10 received translation to his native language of Chinese, a waiver and consent of his right  
11 to personal appearance at his trial, and sentencing, if applicable. See, Exhibit "A",  
12 Waiver and Consent, January 16, 2006, attached.

13 This Court has authority to grant this Motion and permit the trial to  
14 proceed for Defendant Lu in his absence. 21A. Am.Jur.2d Criminal Law §904 (Matters  
15 affecting right of accused in misdemeanor cases) (1981), p. 369.

16 **REQUEST FOR RELIEF**

17 Defendant Lu's Motion waiving his presence pursuant to Rule 43(b)(2) for  
18 trial and sentencing should be granted and the following relief, including but not limited  
19 to, the following be ordered:

20 (1) The Government Plaintiff release Defendant Lu now without  
21 conditions; provided that, his posted reasonable bond remain on deposit with the Court.

22  
23 (2) The Clerk of Court and/or the Government Plaintiff, its  
24 departments, agencies, employees and servants release and return the passport of  
25 Defendant Wen Yueh Lu forthwith.

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5  
6 (3) Such other relief as may be just and necessary.

7 Dated this 16<sup>th</sup> day of January, 2007.

8 Respectfully submitted,

9 Attorneys for Petitioner/Defendant:  
10 WEN YUEH LU

11 THE LAW OFFICES OF MARK S. SMITH

12 By:   
13 MARK S. SMITH

14 BERMAN O'CONNOR & MANN

15 By:   
16 DANIEL BERMAN

## CONSENT AND WAIVER

Federal Rules of Criminal Procedure 43(2)(b), **Defendant's Presence** , provides in relevant part:

(b) **When Not Required.** A defendant need not be present under any of the following circumstances:

\* \* \*

(2) **Misdemeanor Offense.** The offense is punishable by fine or imprisonment, for not more than one year, or both, and with the Defendant's written consent, the court permits arraignment, plea, trial and sentencing to occur in the defendant's absence.

Defendant Lu understands that he has a right to be present at his Trial, and possible sentencing if found guilty, in Magistrate Case No. 06-00031.

Pursuant to Rule 43(b)(2), Defendant Lu, after having been informed and advised of his legal rights and remedies, does consent for the Court to proceed in his absence to the Trial and possible sentencing, if applicable, in Magistrate Case No. 06-00031.

Attorney Mark Smith has reviewed the legal rights and options of Mr. Lu, with Mr. Lu personally, and both Attorney Smith and Mr. Lu hereby waive Defendant Lu's right to appear in person for his trial and sentencing, if applicable, in Magistrate Case No. 06-00031.

I do hereby understand and consent to waive my rights to remain on Guam and appear for my trial and possible sentencing in Magistrate Case No. 06-00031.

Dated: 1/16 2007

LO. WEN - YUEH  
DEFENDANT WEN YUEH LU

Dated: 1/16/07

Mark S. Smith  
MARK S. SMITH, Attorney

**TRANSLATION**

The above Consent and Waiver was translated to Chinese language by Mr. Tai Li Hu, the third party custodian or proxy to Mr. Wen Yueh Lu.

Dated: 1/16/2007

Tai Li Hu  
TAI LI HU